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No. 85-1520

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RUSSELL ANDERSON,

Petitioner,

—v.—

ROBERT E. CREIGHTON, JR., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

MICHAEL AVERY
Avery & Friedman
6 Beacon Street
Boston, MA 02108
(617) 367-2626

SETH KREIMER
University of Pennsylvania
Law School
3400 Chestnut Street
Philadelphia, PA 19104
(215) 898-7447

DAVID RUDOVSKY*
Kairys & Rudovsky
1425 Walnut Street
Philadelphia, PA 19102
(215) 438-4541
**Counsel of Record*

JACK D. NOVIK
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

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INTEREST OF THE AMICUS CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization which has over 250,000 members. Since its founding in 1920, ACLU has been concerned with the protection of fundamental rights and individual liberties that are guaranteed by the Constitution of the United States.

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1. The parties have consented to the filing of the brief, and their letters of consent have been filed with the Clerk of the Court under Rule 36.2 of the Rules of this Court.

STATEMENT OF THE CASE[2]

This case arises from a warrantless search of respondents' home by petitioner, an FBI agent, and several state police officers. These officers were searching for one Vadaain David Dixon, a suspect in a bank robbery that had occurred over five hours before the search at issue.

1. In searching for the suspect, petitioner first searched the homes of Iris Dixon (the suspect's mother) and Minnie Dixon (his grandmother) before going to respondent's home, where they arrived at 8:40 p.m. Respondent Robert Creighton requested to see a search warrant, but was told by a Sergeant De Noma, petitioner's colleague in the search, "we don't have a search warrant. I don't need a search warrant; you watch

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2. Amicus adopts the statement of Respondents. We highlight here the critical facts on the issue presented.

too much T.V." J.A. 44. A warrantless search ensued. Respondent Sarisse Creighton stated that when she asked for a warrant, petitioner stated, "I don't need a search warrant when I'm looking for a fugitive." J.A. 50.

2. On the issue of exigent circumstances, the record makes clear that petitioner did not even consider whether he needed a warrant to enter, and if so, under what circumstance he would be justified in entering without one. See Affidavits of Robert and Sarisse Creighton, supra.

The record shows that there was no immediate or continuous pursuit of the suspect. Similarly, there is no assertion by petitioner that he had an actual or reasonable belief that evidence would be destroyed, or that the suspect would escape if the officers sought a warrant. J.A. 16-23.

3. With regard to the facts relating to whether there was probable

cause to believe that Vadaain Dixon would be at respondent's home, the record shows the following:

Petitioner claims he had information that Dixon's wife lived with respondent up to November 9th (the robbery occurred November 11th), J.A. 21, but the source of his information, Probation Officer William Johnson, contradicts him, stating that the latest information he had was November 1st. J.A. 39, 41-42. Further, petitioner represented that "Vadaain Dixon has stayed on a daily basis at the house of (respondent's) with Cheryl Ann Donlin Dixon (his wife) during his four-hour daily furloughs from the Volunteers of America residence from October 13 to approximately November 9, 1983," J.A. 21. But Probation Officer Johnson said only that "Cheryl Dixon was picking Vadaain Dixon up on a daily basis <u>at the Volunteers of America</u> so that Vadaain Dixon and Cheryl Dixon could spend his daily furloughs

together." J.A. 39 (emphasis added). No basis is provided for petitioner's assertion that the suspect spent time, every day, at respondent's house.

The information relating to the getaway car did not match respondent's automobile. The getaway car was described as two-tone burgundy or maroon and silver (or possibly a darker color), and possibly a Buick. Petitioner determined that respondent's car was a solid, single color, burgundy or maroon Oldsmobile.

4. The trial court granted summary judgement before any discovery was allowed on the facts relating to probable cause and exigent circumstances.

SUMMARY OF ARGUMENT

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), this Court established an objective test to determine if an official was entitled to qualified immunity. If the plaintiff alleges facts that demonstrate a constitutional violation, the court is to determine, at the summary judgment stage prior to full discovery, whether the alleged conduct violated clearly established law of which a reasonable person would have known. Whether there has in fact been a constitutional violation is reserved for the trial itself if no immunity is found.

Petitioner's claim that an official is entitled to immunity where he "could reasonably have believed that his warrantless entry . . . was justified," Brief, at 30, would work a radical change in the governing Harlow standard. It would turn an "objective" and "purely legal test", Mitchell v. Forsyth, 105 S. Ct. 2806, 2816, n.9 (1985) into a

subjective, fact-bound determination. Further, it would (1) defeat Harlow's decided preference for efficient and early resolution of the immunity issue; (2) confuse the distinct legal immunity and factual violation of law inquiries; and (3) effectively immunize police misconduct, particularly in the Fourth Amendment area.

Petitioner also appears to claim that unless the particular conduct of which an official has been accused has previously been held illegal, then he acted reasonably and thus is entitled to immunity. This argument simply ignores reality. Fourth Amendment cases arise in an almost infinite variety of factual situations. Under petitioner's standard, almost every official could claim that he did not know that the law applied to his particular conduct no matter how clear the law. It is illogical to argue that where an officer

has acted unreasonably, that is, without probable cause and exigent circumstances, he can claim that his conduct was reasonable. Moreover, petitioner suggests a vagueness in Fourth Amendment principles where none exists.

This case demonstrates the fallacy of petitioner's position. Not only is the law of warrantless arrests in the home, of exigent circumstances, and of probable cause quite clear, but it provides quite explicit standards of conduct. On the facts as alleged by respondent there is no question that the officer violated these clearly established legal standards, of which he reasonably should have been aware. Whether petitioner in fact had probable cause and whether there were exigent circumstances is a question for a jury after a trial.

In Harlow, this Court struck a

delicate balance that fully protects the officer, yet allows redress for misconduct. On summary judgment, the officer has immunity if the law was not clearly established, and at trial he has a defense if the facts show that he acted reasonably under the circumstances, i.e., the probable cause and exigent circumstances standards have been met. Petitioner's new approach, which would wreck the balance struck in Harlow, must be rejected.

ARGUMENT

BECAUSE THE LAW UNDER THE FOURTH AMENDMENT REQUIRING BOTH PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES PRIOR TO A WARRANTLESS ENTRY INTO A HOME WAS CLEARLY ESTABLISHED, PETITIONER HAS NO ENTITLEMENT TO A QUALIFIED IMMUNITY DEFENSE.

A. Harlow v. Fitzgerald Established An Objective Legal Test To Determine Qualified Immunity.

In Harlow v. Fitzgerald, supra, this Court redefined the doctrine of qualified immunity and announced a fundamental change in its scope and application. To allow for pretrial adjudication of the issue, the Court discarded the subjective element of good faith and focused instead on the state of the law at the time of the alleged constitutional violation.

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

> would have known . . . Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment . . . Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.

Id. at 818-819. Harlow created an objective test for determining whether the applicable legal standard was clearly established. The subjective beliefs of the official involved -- whether malicious or in good faith-- are now irrelevant to the issue of

immunity.[3] Once a court determines that a legal standard governing the governmental action at issue was clearly established, there is no qualified immunity. The factual question whether the officer's conduct violated the established constitutional standard is resolved at trial.

The Court's emphasis on the "objective reasonableness" of an official's conduct "as measured by reference to clearly establish law," Harlow, supra, at 818, was followed in Davis v. Scherer, 468 U.S. 183 (1984) and Mitchell v. Forsyth, 105 S. Ct. 2806 (1985). Davis leaves no doubt about the impact of Harlow upon the qualified

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[3]. The intent, subjective belief and reasonableness of the official may, however, be quite relevant to whether a constitutional violation occurred,but this is an inquiry independent of immunity.

immunity defense. The Court made it clear that the "totality of the circumstances" test of previous cases, which mandated inquiry into both the objective reasonableness of the defendant's conduct and the subjective state of mind, has been replaced by Harlow's formulation. The Court noted that Harlow had "rejected the inquiry into state of mind in favor of a wholly objective standard." Davis, supra, at 191.

In Mitchell v. Forsyth, supra, the Court ruled that warrantless national security electronic surveillance conducted two years before such conduct was first held to be unconstitutional (and where the Court had expressly reserved decision on the question) was not actionable in light of the plainly unsettled nature of the governing principles. In analyzing the nature of a trial court's decision on a summary

judgment motion seeking qualified immunity, the Court held:

> All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions. Id. at 2816 (emphasis added).

B. The Governing Legal Standards Were Clearly Established.

1. The Law Was Clear That, Absent Probable Cause And Exigent Circumstances, A Warrantless Arrest In The Home Violates The Fourth Amendment.

In Payton v. New York, 445 U.S. 573 (1980) this Court resolved a long-standing Fourth Amendment issue by requiring police officers to obtain a warrant before effectuating an arrest of a felony suspect inside that person's house. Steagald v. United States, 451 U.S. 204 (1981) extended the Payton principle to searches of homes of third parties, requiring a search warrant

prior to entry of these premises. In a search for felony suspects, the Court ruled that an arrest warrant

> did absolutely nothing to protect petitioner's privacy interest in being free from an unreasonable invasion and search of his home. Instead, petitioner's only protection from an illegal entry and search was the agent's personal determination of probable cause. In the absence of exigent circumstances, we have consistently held that such judicially untested determinations are not reliable enough to justify an entry into a person's home to arrest him without a warrant, or a search of a home for objects in the absence of a search warrant.

Id. at 212-214.

2. The Grounds For Claiming Exigent Circumstances Were Well Established.

The important privacy interests

protected by the warrant requirement are not to be lightly subordinated to claims of exigent circumstances. In Welsh v. Wisconsin, 466 U.S. 740 (1984), the Court reiterated the "few. . . and carefully delineated" exceptions to the warrant requirement and emphasized that "the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." Id. at 749-50. Indeed, such a search is per se unreasonable, unless exigent circumstances are shown.

> [T]he Court decided in Payton v. New York, supra, that warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances.
>
> . . . .
>
> [T]he Court has recognized only a few such emergency conditions, see, e.g., United States v. Santana, 427 U.S. 38, 42-43 (1976)

> (hot pursuit of a fleeing felon); Warden v. Hayden, 387 U.S. 294 (1967) (same); Schmerber v. California, 384 U.S. 757, 770-771 (1966) (destruction of evidence); Michigan v. Tyler, 436 U.S. 499, 509 (1978) (ongoing fire), and has actually applied only the "hot pursuit" doctrine to arrests in the home, see Santana, supra.

466 U.S. at 749-750.[4]

The Eighth Circuit had also clearly delineated the limited situations in which the exigent circumstances exception would apply. See, United States v. Perez, 700 F.2d 1232, 1237

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[4]. Moreover, Welsh indicates the general agreement among the Justices of the limited grounds for claiming exigent circumstances (a clearly demonstrated need to prevent escape, injury to others or destruction of evidence) that would in fact be frustrated by resort to the warrant process. Welsh, supra, at 749-750; Id. at 759. (White, J., dissenting).

(8th Cir. 1983), cert. denied,104 S.Ct. 3587 (1984); United States v. Selberg, 630 F.2d 1292, 1295-96 (8th Cir. 1980).

Under this standard, petitioner has to demonstrate at trial that he had reason to believe that the suspect would destroy evidence, injure others, or escape. Surely no such showing has been made pre-trial. There is no evidence of hot pursuit, no reason to believe that the suspect would injure his own family members, and there is no basis for believing that any evidence would be destroyed. And given the critical fact that a warrant could be secured by a quick phone call, see Fed. R. Crim. P. 41(c), any pre-trial claim to exigent circumstances on this record is simply untenable.

3. The Test For Determining Probable Cause Was Well Established.

Both the concept and application of

the probable cause requirement are well settled. In Texas v. Brown, 460 U.S. 730, 742 (1983), this Court stated:

> "As the Court frequently has remarked, probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief,' Carroll v. United States, 267 U.S. 132, 162 (1925), that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A 'practical, nontechnical probability that incriminating evidence is involved is all that is required. Brinegar v. United States, 338 U.S. 160, 176 (1949).

Thus, for example, if an officer arrests a robbery suspect on the strength of a mistaken identification,

probable cause exists for the arrest even though the defendant is later found innocent. Indeed, this type of mistake is exactly the kind of reasonable error that is incorporated in the probable cause concept. No doctrine of "good faith" or qualified immunity is necessary to provide the police officer with a defense, because he already has one.

This case presents no difficulty in determining whether the law was clearly established. The constitutional principle at issue -- that no search of a third party's house for a suspect can be conducted without a warrant unless there is both probable cause to believe that the suspect is present and exigent circumstances excusing the absence of a warrant -- is a precise subprinciple of the Fourth Amendment, clearly establishing the limit on governmental authority in a particular area of police work. No narrower principle is needed

to define the limits of police authority and this Court has provided the essential guidelines for the probable cause and exigent circumstances determinations.

Thus, when plaintiffs allege facts that, if true, would entitle them to relief under clearly established legal principles, the constitutionality of police activity should be determined on a fact-bound, case by case analysis under which the officer will receive the full benefits and protections of the reasonableness standard that controls probable cause and exigent circumstances determinations. This standard "protects both the officer and the citizen." Henry v. United States, 361 U.S. 98, 102 (1959).

C. The Doctrines Of Probable Cause And Exigent Circumstances, Based As They Are On Settled Standards Governing How A Reasonable

Officer Should Act, Are Not Subject To An Immunity Defense Where An Officer Enters A Home Without A Warrant.

Under Payton and Steagald petitioner has the burden of demonstrating both probable cause to believe that the suspect would be found in respondent's premises and that exigent circumstances existed to justify the entry without a warrant. These are factual inquiries that are not amenable to resolution on summary judgment under Harlow. Because the standards governing these constitutional issues are well settled, the question is not what constitutional rule applies; rather, it is whether a given set of facts violates the standard established by a known rule. Once the trier of fact determines that an officer acted without probable cause or exigent circumstances, i.e., that he acted unreasonably, the inquiry ends. A defendant cannot then claim a qualified

immunity where, under a clearly established constitutional principle, he has by definition acted unreasonably and in violation of the Constitution.

The Courts of Appeals have widely recognized that probable cause is a "clearly established" constitutional standard and therefore acts undertaken without probable cause are not subject to a qualified immunity. See, e.g., Creamer v. Porter, 754 F.2d 1311 (5th Cir. 1985); Deary v. Three Un-Names Police Officers, 746 F.2d 185 (3d Cir. 1984); Clark v. Beville, 730 F.2d 739 (11th Cir. 1984); Trejo v. Perez, 693 F.2d 482 (5th Cir. 1982). See also Slakan v. Porter, 737 F.2d 368 (4th Cir. 1984); Coon v. Ledbetter, 780 F.2d 1158 (5th Cir. 1986); Blackburn v. Snow, 771 F.2d 556 (1st Cir. 1985). Petitioner ignores this logical and well-settled application of Harlow to the fact-bound probable cause question. He calls for a

new standard that would provide immunity if an official "reasonably" should not have known that his particular conduct was unreasonable.

In Llaguno v. Mingey, 763 F.2d 1560 (7th Cir. 1985) (en banc), the Court analyzed the problem as follows:

> The good sense of Harlow in withdrawing the issue of immunity from the jury is particularly evident in a case such as this where the police are charged with having acted without probable cause. The question whether they had probable cause depends on what they reasonably believed with reference to the facts that confronted them, as the judge instructed in the passage we quoted earlier. To go on and instruct the jury further that even if the police acted without probable cause they should be exonerated if they reasonably (though erroneously) believed that

> they were acting reasonably is to confuse the jury and give the defendants two bites at the apple.

Id. at 1569 (emphasis added).

In Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336, 1358 (7th Cir. 1985), Judge Posner concurring, stated:

> But what was perfectly clear when these arrests were made, as now, is that an arrest is not proper without probable cause. So if there was no probable cause, there was no immunity; if there was probable cause, then, as just pointed out, there was immunity. The issue of immunity will thus be resolved automatically by the jury's resolution of the issue of probable cause;. . . (emphasis added).

Judge Jon O. Newman has cogently explained why no immunity should be permitted where the officer has failed to show probable cause:

But however well-intentioned this second ingredient of the good faith defense, it involves nearly circular reasoning that promotes confusion and sometimes defeats meritorious claims. For example, the victim's cause of action for an arrest in violation of his Fourth Amendment rights requires an arrest without probable cause. To make out his case, the plaintiff must establish that a reasonably prudent police officer, under all the circumstances, would not have had probable cause to believe that he had committed a crime. Then, under Bivens, the officer still has a defense if acted in good faith and has a reasonable belief in the validity of his action, that is, if he reasonably believed that he did have probable cause. But if the plaintiff's own case requires him to show an arrest that was not reasonably based on

> probable cause, what does the defense mean? Surely the officer could not reasonably believe that there was probable cause for an unlawful arrest, for an unlawful arrest is by definition an arrest for which a prudent police officer could not reasonably believe there was probable cause.

Newman, Suing The Lawbreakers: Proposals to Strengthen the Section 1983 Damage Ready, 87 Yale L.J. 447, 460 (1978).

This Court's cases defining probable cause demonstrate the broad latitude given police officers to search or arrest. See, e.g., Brinegar v. United States, 338 U.S. 160 (1949); Beck v. Ohio, 379 U.S. 89 (1964); Illinois v. Gates, 462 U.S. 213 (1983). If an officer acts upon information which is insufficient to meet this not very demanding test, it is untenable for petitioner to claim that the officer is entitled to immunity on a theory that

the law had not clearly established that his particular conduct was illegal. If an officer did not have a sufficient basis to make a "practical, common-sense" decision that a "fair probability" of crime or evidence existed, he cannot have acted in an objectively reasonable manner. Similarly, if he cannot show hot pursuit, danger of destruction of evidence, or danger to others, he cannot reasonably claim that exigent circumstances excuse the lack of a warrant. As the Court below recognized, further discovery is necessary since this case presents sharp factual disputes on exactly what information petitioner relied. 766 F.2d at 1273-75.[5]

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[5] Indeed, petitioner did not even consider whether he needed a warrant to enter, and if so, under what circumstances he would be justified in entering without one. Respondent Robert Creighton submitted an affidavit stating that a member of the search party (which included petitioner) told him in response to

Petitioner's reliance on Malley v. Briggs, 106 S.Ct. 1092 (1986), is misplaced. In Malley, the Court again stressed the "objectively reasonable" standard in determining qualified immunity. In the context of a case in which the officer did exactly what the Fourth Amendment requires, submitting the facts to a neutral magistrate for determination of probable cause, the Court recognized "where officers of reasonable competence could disagree on (the) issue," immunity would be granted. Once the magistrate has acted, the

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his request to see a warrant: "We don't have a search warrant. I don't need a search warrant; you watch too much TV." J.A. 44. Respondent Sarisse Creighton stated that when she asked petitioner for a search warrant he said "I don't need a search warrant when I'm looking for a fugitive." J.A. 50. Plainly, petitioner ignored the teachings of Payton and Steagald. It is, therefore, facetious for him to claim that he acted "reasonably."

officer should receive immunity in close cases. Here, by contrast, the officer disregarded the warrant requirement. There has been no independent evaluation of probable cause and therefore the Briggs rationale is inapplicable. Indeed, the Court stressed the unique nature of the case as one involving submission of facts to secure a warrant. Id. at 1098, n.6. Just as Leon did not decide good faith exception to the exclusionary rule in the context of a warrantless arrest, Briggs went no further than a discussion of qualified immunity in the context of that case.

If petitioner had obtained a warrant, but a court later found no probable cause for its issuance, the immunity issue would be presented in a significantly different context. The exigent circumstances issue would be moot and there would be compliance with the express mandate of the Fourth Amendment

-- submission of the decision to a magistrate. Thus, in this case, depending on whether a warrant was sought, different standards must control the immunity question.

The unprecedented nature of petitioner's claim is further demonstrated by the lack of any "common law counterpart" to the immunity asserted. Malley v. Briggs, supra, at 1095. At common-law a determination that an officer lacked probable cause in warrantless action was sufficient to establish liability. In Director General of Railroads v. Kastenbaum, 263 U.S. 25, 27-28 (1923), the Court stated:

> The gist of it is an unlawful detention, and that being shown the burden is on the defendant to establish probable cause for the arrest . . . But the standard applied to defendant's consciousness is external to it. The question is not whether he thought the

> facts to constitute probable cause, but whether the court thinks they did. Holmes on the Common Law, 140. Probable cause is a mixed question of law and fact. The court submits the evidence of it to the jury, with instructions as to what facts will amount to probable cause if proved . . . But, as we have seen, good faith is not enough to constitute probable cause. That faith is not enough to constitute probable cause. That faith must be grounded on facts within the knowledge of the (arresting officer), which in the judgment of the court would make his faith reasonable.

See also Entick v. Carrington, 19 How. St. Tr. 1030, 1066, 95 Eng. Rep. 807 (K.B. 1765); Restatement (Second) of Torts, §121, Comment i:

> A peace officer making an arrest without a warrant is protected in every case where he acts under a reasonable mistake as to

> the existence of facts which, under the rule stated in this Section, justify an arrest without a warrant. On the other hand, no protection is given to a peace officer who, however, reasonably acts under a mistake of law other than a mistake as to the validity of a statute or ordinance.

There is, of course, nothing novel about these long standing common law principles. They are based on a well settled standard of reasonableness that allows for a wide latitude of official discretion.

D. The Test Proposed by Petitioner Would Work A Radical Change In The Scope And Nature Of The Immunity Defense.

The new immunity doctrine suggested by petitioner would subsume virtually all constitutional liability issues into a new, highly subjective, and unprecedented test of immunity. Instead of the Harlow standard, the new test would be whether the official "could reasonably

have believed that his (action) was legally justified." Brief, at 30. Such a transformation would bring this Court full circle, back to the unsatisfactory pre-Harlow law under which qualified immunity would depend upon the specific, discrete facts of each case, requiring full discovery and an inquiry into the subjective mental state and motives of defendants.

Davis v. Scherer, supra, deliberately eliminated the "totality of the circumstances" test in immunity adjudications in order to avoid precisely the kind of fact-specific adjudication urged by petitioner. If an immunity claim depends upon whether an official should have known whether his specific conduct violated an established right (as opposed to whether he should have been aware of a constitutional right that governs his alleged conduct), a court must insist, of course, on knowing all

of the facts and circumstances under which the defendant acted. It must also consider whether conflicting facts preclude a summary judgment motion. Thus, a primary purpose of Harlow, early adjudication of immunity, is defeated. In many §1983 and Bivens cases the actual conduct of the official is what the entire case is about and can only be resolved by a trial. A court simply cannot make a fair determination of whether the defendant's actions and conduct were violative ("clearly" or otherwise) of a constitutional standard unless every relevant fact surrounding that conduct is presented to the trier of fact.

Consider, for example, a case alleging a due process and Fourth Amendment violation for the unlawful use of deadly force. See Tennessee v. Garner, __ U.S. __, 105 S. Ct. 1694 (1985). Under Garner, the essential question is

whether the defendant had probable cause to believe that the suspect posed a significant threat of serious physical harm to the officer or others. The officer is required to show an "articulable basis to think (the suspect) was armed." Id. at 1706. Quite obviously, the courts, including this Court, have had few occasions to apply this now clearly established principle. But surely that does not mean that an officer who in fact violates this clear standard should be immune from liability solely because the specific facts in his case had not been previously litigated. This standard itself provides the margin for error needed to protect the officer -- a reasonable belief in the threat posed by the suspect. The immunity sought by petitioner would eviscerate the standard.

If this Court were to adopt petitioner's suggested standard, it would

necessitate an inquiry into all of the circumstances surrounding the officer's actions, including the subjective issues of intent, knowledge and motive. As a threshold matter, it would be important to know whether the officer -- who claims to have acted reasonably, even though in contravention of settled law -- considered the applicable legal principles. It would subvert the immunity doctrine to permit an officer, such as petitioner, whose conduct indicates ignorance or willful disregard of controlling cases in this Court, to assert that he nevertheless had a reasonable basis for believing his conduct to be legal.

Furthermore, an examination of the officer's training and experience would be necessary. This Court has ruled that the officer's experience is an integral factor in determining reasonableness under the Fourth Amendment, See Texas v.

Brown, 460 U.S. 730, 742-743 (1983); United States v. Brignoni-Pounce, 422 U.S. 873 (1975).

Petitioner seeks to collapse the very different tests for immunity and liability, and to turn the legal immunity issue into a fact-bound determination. In Mitchell v. Forsyth, supra, at 2816, n.9, this Court emphasized that the immunity issue "is a purely legal one." Petitioner would have the trial court resolve, pre-trial, the decidedly factual issue of reasonableness. See also Davis v. Scherer, supra, at 195 (on immunity claim, rejecting "inquiry into whether official in the circumstances of his decision should have appreciated the applicability and importance of the (regulation) at issue.").

This Court should not countenance a double standard. On the qualified immunity issue, plaintiffs are barred

from proving that an officer acted "unreasonably" if the officer did not violate clearly established federal laws by, for example, failing to follow a state regulation. See Davis, supra. By the same token, the defendant should not be permitted to attempt to show that he acted "reasonably" when his alleged conduct violated clearly established law. The defense of reasonableness is clearly one for trial.

E. The Purposes of Qualified Immunity Would Be Undermined By Petitioner's New Doctrine.

Petitioner's policy arguments are revealingly weak. First, to disallow a defense of immunity in this kind of case will not hold a government official to a "standard of perfection." Brief, at 29. The standards under the Fourth Amendment -- probable cause and reasonableness-- do not require anything close to perfection. Probable cause is defined by the

reasonableness of one's actions in light of all the circumstances, thus providing an ample margin of error. This doctrine "protects both the officer and the citizens." Henry v. United States, supra, at 102. The more dangerous the situation, the quicker an officer has to make a judgment and act, and the greater the risk of non-action, the more protection the officer has under the probable cause and reasonableness standards. See, e.g., Terry v. Ohio, 392 U.S. 1 (1968); Pennsylvania v. Mimms, 434 U.S. 106 (1977). Indeed, it is only when the officer acts contrary to what a reasonable officer would do that probable cause is found to be lacking.

In this case it is particularly ironic that petitioner complains of a supposed "standard of perfection" when the record shows he did not even consider the constitutional consequences of his actions. J.A. 43-45; 46-52 (demonstrating that petitioner believed

a warrant is not required when searching for a fugitive. Under these circumstances, petitioner's claim of reasonableness is highly suspect.[6]

Petitioner makes the exaggerated claim that without this new rule "(a)n official could be subjected to monetary liability even if the relevant legal principle, and the case law applying that principle, did not provide any

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[6]. Petitioner also seeks to equate respect for constitutional procedures and established rights with official "timidity." Brief, at 23. But this Court has made clear that where rights are clearly established, the official "should be made to hesitate." Harlow, supra, at 819. This is particularly true where the choice is not one between action and inaction, but rather, as here, action without a warrant or action sanctioned by a judicial officer. The interests of effective law enforcement -- and of the Constitution -- would have been satisfied in this case if petitioner had followed the constitutionally mandated process.

indication that the official's conduct was unlawful." Brief, at 25. But no such result is possible under Harlow since if the "relevant legal principle" is not clearly established no liability can result. Petitioner's argument rests on the demonstrably false proposition that a law can be "clearly established," but not provide "any indication" as to how an official is to behave.

This case, in which clearly stated standards of probable cause and exigent circumstances provided petitioner with more than sufficient guidelines for proper conduct, reveal the fallacy of petitioner's position. In Hobson v. Wilson, 737 F.2d 1, 26 (D.C. Cir. 1984), the court cautioned against the very position advanced by petitioner, stating that the right at issue cannot be defined "so narrowly as to require that there be no distinguishing facts between the instant case and existing precedent . . . (since this) would unquestionably turn qualified into absolute immunity

requiring immunity in any new fact situation."

There is the distinct danger that petitioner's proposed test would in effect both deny any remedy to persons whose Fourth Amendment rights are violated and directly reduce the substantive protections of the Fourth Amendment. It would certainly be argued by the Government that if this standard applies to the determination of civil liability, it should also control application of the exclusionary rule. Compare United States v. Leon, 468 U.S. 897 (1984) with Malley v. Briggs, supra. If it were so extended, the victim of unconstitutional police actions in the Fourth Amendment area would be without a remedy wherever the officer cannot be shown to have been on notice of an authoritative decision on the facts of his case. Since few of the myriad police-citizen encounters are previewed, fact by fact, in decisions of this Court

or the lower courts, such a rule would eliminate remedies in a great number of cases. And even if the Court were not to so limit the exclusionary rule, the result would hardly be more satisfactory: those who were not charged with any wrongdoing would be denied their only remedy.

More fundamentally, petitioner's standard would work a rewriting of police activity under the Fourth Amendment. Probable cause would no longer be defined as the facts and circumstances that would cause a reasonably prudent police officer to believe that the suspect had committed or was committing a criminal act (or that items would be found in a search). Beck v. Ohio, 379 U.S. 89, 91 (1964). Rather, even if the legal standard was clearly established, the issue would be whether the officer "reasonably could have believed," Brief, at 30, that his conduct would violate the plaintiff's

constitutional rights. In other words, not only would the plaintiff have to show a violation of a clearly established right, he would also have to show a violation so egregious as to dispel any notion that the officer could have believed his actions to be justified. Unfortunately, some lower courts have imposed this unjustified standard. See Saldana v. Garza, 684 F.2d 1159 (5th Cir. 1982); Floyd v. Farrell, 765 F.2d 1, 5 (1st Cir. 1985).

Adjudication of Fourth Amendment issues would therefore no longer be based on the clearly established standard of probable cause. Since rights are defined by court decisions, the substantive standards of the Fourth Amendment would be quite unknown, and the controlling standards would reflect the immunity rule rather than the established concept of probable cause.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

David Rudovsky, Esq.
Kairys & Rudovsky
1425 Walnut Street
Philadelphia, PA 19102
215/438-4541
Attorney of Record

Michael Avery, Esq.
Avery & Friedman
Six Beacon Street
Boston, MA 02108
617/367-2626

Seth Kreimer, Esq.
Law School
University of Pennsylvania
3400 Chestnut Street
Philadelphia, PA 19104
215/898-7447

Jack D. Novik, Esq.
A.C.L.U.F.
132 West 43rd Street
New York, NY 10036
212/944-9800